80-59

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PAUL D. CARMI,

Petitioner,

vs.

METROPOLITAN ST. LOUIS SEWER DISTRICT, a municipal corporation; LAWRENCE J. BANES; RICHARD A. MEYER; HENRY W. LEE, JR.,; PHELIM O'TOOLE, individually and in official capacity as members of Board of Trustees of Metropolitan St. Louis Sewer District; PETER F. MATTEI, Exec. Director; MARY HAYSLETT, Personnel Officer, individually and in official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on May 6, 1980.

CITATION TO OPINIONS BELOW

The order of the United States District Court is reported at 471 F.Supp. 119 (E.D. Mo. 1979). The opinion of the United States Court of Appeals is contained in Appendix A hereto. The order denying a petition for rehearing is contained in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 6, 1980. On May 29, 1980 the court denied a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C., Section 794, prohibits employment based handicapped discrimination with respect to recipients of federal financial assistance.

STATUTORY PROVISIONS

The statutory provisions involved are Section 504 of the Rehabilitation Act of 1973, 29 U.S.C., §794 and Section 120 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, 29 U.S.C., §794a.

29 U.S.C., §794:

> No otherwise qualified handicapped individual in the United States, as defined in Section 7(6) (29 U.S.C.S., §706(6)), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C., §794a:

> (a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C., 2000e-16 (42 U.S.C.S., §2000e-16, including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5 (f) through (k)(42 U.S.C.S., Section 2000e-(f) - (k)), shall be available, with respect to any complaint under section 501 of this Act (29 U.S.C.S., §791), to any employee or ap-

plicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C.S., §§ 2000d et seq.) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such asistance under section 504 of this Act (29 U.S.C.S., § 794).

(b) In any action or proceeding to enforce or charge a violation of a provision of this title (29 U.S.C.S., § 790 et seq.), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

Petitioner Carmi has a rare, hereditary physical disability known as Progressive Peroneal Atrophy (or Charcot - Marie -Tooth Disease). This is a condition in which there is a slow but progressive atrophy of the muscles of the hands and feet. Aside from his disability petitioner is an energetic and active young man.

In April of 1976, Mr. Carmi sought employment with the respondent as a "storekeeper". Despite being selected as the preferred candidate, petitioner was rejected pursuant to a routine pre-employment physical examination.

Petitioner's suit was filed in the United States District Court For the Eastern District of Missouri. His principle allegation

was that the pre-employment physical examination to which he was subjected was not job-related and violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C., § 794.[1]

After a trial the district court dismissed the complaint. The court determined that the Petitioner had not carried his burden of proving that he was an "otherwise qualified" handicapped individual within the meaning of Section 504.

On appeal, the court relied upon totally different grounds to affirm the district court.

Using the same approach as the Fourth Circuit in *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied,* 99 S.Ct. 2895 (1979) the Court assessed the impact of Section 120 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 29 U.S.C., § 794(a)(2), ("The 1978 Amendments").[2] The Court concluded that Congress intended *via* this Amendment to incorporate the standards of Section 604 of Title VI, 42. U.S.C., § 2000d-3, which provides that Title VI encompasses claims of employment discrimination only "where a primary objective of the Federal financial assistance is to provide employment."[3]

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[1] Petitioner's constitutional claims are not before this Court.

[2] Section 120 of the 1978 Amendments provides that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved . . . under section 504 . . .".

[3] In a well-reasoned concurring opinion, the Hon. Theodore McMillian rejected the majority's analysis and adopted the position urged by the Petitioner herein.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, if left intact, will deprive handicapped individuals of any remedy for employment discrimination despite the clear intention of Congress to the contrary. This case, therefore, presents an issue of importance to tens of thousands of handicapped individuals with respect to the scope of Section 504 of the Rehabilitation Act of 1973.

1. Prior to the 1978 Amendments, Section 504 outlawed all employment discrimination against the handicapped regardless of the object of Federal aid. As passed in 1973 the principle purpose of the Act was to:

> "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment. 29 U.S.C., § 701(8)."

The Act originally defined "handicapped individual" in terms of employment.[4] Pub. L. No. 93-112, Section 7(6). Section 504 was designed to eliminate discriminatory barriers which prevented the handicapped from living useful and productive lives.

The legislative history of the Act is replete with references to eliminating employment discrimination.[5] Furthermore, prior to the decision in this case and *Trageser, supra.*, the courts have

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[4] The following year, recognizing that the definition of handicapped individual was limited to employment, Congress amended Section 7(6) to emphasize that Section 504 "was not to be narrowly limited to employment." S. Rep. No. 93- 1297, 93rd Cong., 2nd Sess. 23, (1974).

[5] See e.g. S. Rep. No. 93-318, 93rd Cong., 1st Sess. 18-19, 70 (1973); S. Rep. No. 93-319, 93rd Cong., 1st Sess. 2, 8 (1973); S. Rep. No. 93-1139, 93rd Cong., 2nd Sess. 23-25 (1974); S. Rep. No. 93-1297, *supra,* at 38; 119 Cong. Rec. 24587-24588 (1973) (remarks of Sen. Williams).

consistently applied Section 504 to employment decisions regardless of the purpose of the federal assistance. See e.g. *Gurmankin* v. *Costanzo,* 556 F.2d 184, 186 (3rd Cir. 1977); *Whitaker* v. *Board of Higher Education,* 461 F.Supp. 99 (E.D. NY, 1978); *Davis* v. *Bucher,* 451 F.Supp. 791 (E.D. Pa., 1978). *Duran* v. *City of Tampa,* 430 F.Supp. 75, 451 F.Supp., 954, (M.D. Fla. 1977, 1978).

Section 504 has always been considered the cornerstone of Congress' efforts to eliminate employment discrimination against the handicapped. Since Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000-e *et. seq.,* does not protect handicapped persons, the applicability of Section 504 to employment is essential to achieving this major prupose of the Rehabilitation Act.

As noted by Judge McMillian, the limitations contained in Title VI of the 1964 Act simply carve out an area of exclusive enforcement under Title VII. By extending those same limitations to Section 504 the court of appeals has left victims of employment based handicapped discrimination with no remedy at all.

In light of the legislative history behind Section 504 and the manner in which the Courts have interpreted it, the holding by the court of appeals in this case can be justified only if the 1978 Amendments unequivocally required such a result.

2. The 1978 Amendments, however, merely provide that the "remedies, procedures, and rights set forth in Title VI . . . shall be available to any person aggrieved," under Section 504. By making these remedies, procedures, and rights "available", the language suggests an expansion of avenues to redress rather than a limitation. Furthermore, as pointed out by Judge McMillian, Section 604 of Title VI applies only to agency action and says nothing about what is available to "person(s) aggrieved".

The court of appeals decision also finds no support in the legislative history. The Senate Report accompanying the 1978 Amendments specifically points out that:

> "It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under Section 504 (29. U.S.C., §794) conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement, S. Rep. No. 95-890 (1978) at 19, 95 Cong., 2nd Sess."

In any event, whatever misunderstandings may have been present when the Fourth Circuit decided *Trageser, supra.,* simply no longer exists.

In response to *Trageser,* the Senate Committee on Labor and Human Resources held hearings on Senate Bill 446 which seeks to amend Title VII by including the handicapped as a protected class. In its report the Committee stated:

> "In view of this history, it is the Committee's view that the Court's decision in *Trageser* v. *Libbie Rehabilitation Center, Inc.,* 590 F.2d 87 (4th Cir., 1978) *cert. denied,* 99 S. Ct., 2895 (1979), is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of Title V, regardless of the designated use of the Federal funds received by the employer in question.
>
> It is, and always has been the Committee's intent that any handicapped individual aggrieved by a violation of Title V has the right under existing law to proceed privately in federal court to enforce the rights and remedies afforded under Title V of the Rehabilitation Act of 1973, as amended, and to receive back pay and attorney's fees if successful." S. Rep. No. 96-316 (1979) at 12-13, 96 Cong. 1st Sess.

The court of appeals has therefore reached a result squarely at odds with the express intent of Congress. Unless this court acts to correct this error numerous handicapped people will be left without a judicial remedy to which there can be no doubt they are entitled.

CONCLUSION

In light of the foregoing, the decision in this case is totally at odds with the language and intent of the 1978 Amendments. The decision also poses a grave threat to the rights of the handicapped by leaving them virtually without a remedy.

To correct this obvious error and resulting injustice, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stuart R. Berkowitz, Attorney for Petitioner, hereby certify that I served the foregoing *Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit,* upon Donald Stohr, Attorney for Defendants, One Mercantile Center, St. Louis, Missouri 63101, by depositing a true copy thereof in the mail, proper postage prepaid, this 11th day of July, 1980.

STUART R. BERKOWITZ

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 79-1325

Paul D. Carmi,
Appellant,

v.

Metropolitan St. Louis Sewer District, a municipal corporation; Lawrence J. Banes; Richard A. Meyer; Henry W. Lee, Jr.; Phelim O'Toole, individually and in official capacity as members of the Board of Trustees of Metropolitan St. Louis Sewer District; Peter F. Mattei, Exec. Director; Mary Hayslett, Personnel Officer, individually and in official capacities,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: November 6, 1979

Filed: May 6, 1980

Before LAY, Chief Judge,* BRIGHT and McMILLIAN, Circuit Judges.

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* The Honorable Donald P. Lay became Chief Judge of the Eighth Circuit on January 1, 1980.

LAY, Chief Judge.

Paul D. Carmi appeals the denial of injunctive, declaratory and monetary relief for alleged discrimination in employment on the basis of handicap in violation of 29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973), 42 U.S.C. §§ 1983, 1985(3), and the equal protection and due process clauses of the fourteenth amendment.

Paul Carmi has a rare, hereditary, physical disability known as Progressive Peroneal Atrophy or Charcot-Marie-Tooth Disease. This condition results in deterioration of the muscles and nerves of the hands and feet.

On April 1, 1976, Carmi applied for employment with Metropolitan Sewer District (MSD), a municipal corporation and political subdivision of the State of Missouri. Following a series of interviews, he was chosen as the preferred applicant for the job of storekeeper at MSD's Bissel Treatment Plant.[1] As the last step in the hiring process, he was required to submit to a pre-employment physical, and referred to the Sutter Clinic for that purpose.[2] He was briefly examined by Dr. Vernon Balster, an employee of the Sutter Clinic. Upon observation of the degree of muscle deterioration in Carmi's hands and feet, Dr. Balster determined that Carmi was not capable of regularly lifting 60 pounds or safely driving a fork lift, and concluded Carmi would be unable to successfully perform the duties of a storekeeper. His recommendation that Carmi not be hired was

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[1] The district court found that a storekeeper must be capable of moving 55 gallon drums weighing approximately 450 pounds by utilizing a drum dolly, operating a fork lift truck, and lifting heavy, bulky objects alone or with the assistance of another, and that the heavier items in the storeroom weigh from 48 to 170 pounds.

[2] The district court found that the pre-employment physical examinations required of all prospective employees as the last step in the hiring process, are performed at Sutter Clinics, Inc., an independent establishment utilized by MSD on a fee-for-service basis.

followed by MSD. Carmi's employment application was kept on file, and he was subsequently considered for one other position which was awarded to a more experienced man. Since June 1978, Carmi has been employed as a parts clerk with the Gusdorf Corporation.

The district court held that Carmi failed to prove he was an "otherwise qualified" handicapped individual as required by 29 U.S.C. § 794, or that his constitutional rights had been violated, and that he had therefore failed to establish a claim under 42 U.S.C. §§ 1983 and 1985(3).

I. **Rehabilitation Act.**

The initial question before us is whether Carmi has standing to bring an action under 29 U.S.C. § 794 for discrimination in employment.

29 U.S.C. § 794 provides in part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving Federal financial assistance. . . . (emphasis added).*

Section 794a(a)(2), makes available to persons aggrieved under section 794 the rights, remedies and procedures of title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*[3] Section 2000d provides:

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[3] The rights, remedies and procedures of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, were made available in section 794a(a)(1) to persons complaining of handicap discrimination in federal employment in violation of 29 U.S.C. § 791, section 501 of the Rehabilitation Act.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This provision is limited by § 2000d-3 which states:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

It is true section 2000d-3 expressly limits only agency enforcement to situations where a primary objective of the federal financial assistance is to provide employment. Nevertheless, the legislative history of title VI lends strong support to our conclusion that Congress did not intend to extend protection under title VI to any person other than an intended beneficiary of federal financial assistance.[4] Thus, in suits charging employment discrimination under title VI, one of the purposes of the federal financial assistance must be to provide employment. Since section 794 was modeled after, and intended to be enforc-

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[4] During the debates on the Civil Rights Act of 1964, concern was expressed that title VI would permit government intervention into every aspect of the operations of the recipients of federal financial assistance. Representative Celler responded:

> This title simply provides that, where Federal money is used to support any program of activity . . . the program must be used for the benefit of both races, without discrimination.
>
> . . . .
>
> The bill would require that each Federal agency which extends financial assistance of the type covered by title VI must establish nondiscriminatory standards of general application.

ed in the same manner as title VI,[5] the limitations on private judicial enforcement of title VI apply to private suits brought under section 794.[6] The Fourth Circuit reached the same conclusion in *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 99 S.Ct. 2895 (1979).

> . . . It would, in short, *assure the existing right to equal treatment in the enjoyment of federal funds.*

110 Cong. Rec. 1518-19 (emphasis added).

> *As to each assisted program or activity, title VI will require an identification of those persons whom Congress regarded as participants and beneficiaries,* and in respect to whom the principle declared in title VI would apply.

Id. at 1521 (emphasis added).

See 110 Cong. Rec. 1542 (remarks of Rep. Lindsay); 110 Cong. Rec. 1602 (remarks of Rep. Mathias); 110 Cong. Rec. 2480-81 (remarks of Rep. Ryan); 110 Cong. Rec. 6545 (remarks of Sen. Humphrey); 110 Cong. Rec. 7060 (remarks of Sen. Pastore); 110 Cong. Rec. 13380 (letter from Deputy Atty. Gen. Nicholas DeB. Katzenback to Rep. Celler).

The language of section 2000d-3 was added to the bill to make it clear that discrimination in employment which does not affect intended beneficiaries of federal assistance is not within the reach of title VI. *See United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 882-83 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967).

[5] *See* [1974] U.S. Code Cong. & Ad. News 6373, 6390-91.

[6] Section 794 was also modeled after section 901 of title IX, 20 U.S.C. § 1681. *Id.* Our interpretation here is consistent with recent decisions in which the language of section 901(a) of title IX, which is virtually identical to that of section 794, has been construed as covering only direct beneficiaries of federal funds. These cases have rejected HEW attempts to enforce regulations under title IX, which extend to the employment practices of recipients of federal assistance. *See Junior College Dist.* v. *Califano*, 597 F.2d 119, (8th Cir.) *cert. denied*, 100 S.Ct. 467 (1979); *Islesboro School Comm.* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S.Ct. 467 (1979); *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S.Ct. 467 (1979).

The district court found that the federal financial assistance MSD received during 1976, was in the form of construction and engineering grants for the Lemay Treatment Plant from the Environmental Protection Agency. Since Carmi was not an intended beneficiary of the federal assistance, he lacks standing to bring suit under section 794.[7]

II. Constitutional Claims.

We agree with the district court's finding that Carmi does not have a liberty or property interest sufficient to invoke the protections of the due processes clause.

Property interests encompassed by the due process clause of the fourteenth amendment are not created by the Constitution, but by rules or understandings stemming from an independent source sufficient to support a claim of entitlement to the benefit. *See Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972); *Perry* v. *Sindermann,* 408 U.S. 593, 601 (1972). Carmi relies upon no statutory entitlement to employment with MSD, and, although his expectation of employment was somewhat encouraged by MSD, he does not allege the existence of a binding understanding. His interest in employment, therefore, did not rise to the level of a constitutionally protected property interest. *See Board of Regents* v. *Roth,* 408 U.S. at 577; *Coleman* v. *Darden,* 595 F.2d 533, 538 (10th Cir.), *cert. denied,* 100 S. Ct. 267 (1979); *Thompson* v. *Link,* 386 F.Supp. 897, 899 (E.D. Mo. 1974). Carmi does not claim any infringement of a liberty in-

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[7] We also reject Carmi's contention that although MSD's funding was from EPA, HEW regulations on reasonable accommodation and pre-employment inquiries, 45 C.F.R. §§ 85.53, .55 (1979), are directly applicable to MSD. These sections, adopted in 1978, merely establish standards to be followed by each federal agency and department in promulgating its own regulation implementing section 794. *See* 45 C.F.R. § 85.4 (1979); Exec. Order No. 11914, 45 C.F.R. 400 (1979); *see also* 45 C.F.R. § 84.2 (1979). Moreover, they do not have retroactive applicability. *See* 43 Fed. Reg. 2132, 2133 (1978).

terest such as reputation or free speech, nor impairment of his ability to obtain another job. We conclude that Carmi has no interest necessitating due process protection.[8]

We do not agree with Carmi that MSD's reliance on Sutter Clinic recommendations is arbitrary and capricious so as to violate his right to equal protection. The classification of prospective employees into those who pass the physical examination and those who do not, is rationally related to MSD's asserted goal of insuring the employment of individuals who can perform their jobs without endangering themselves or others.[9]

Carmi does not challenge the district court's finding, supported by the evidence, that all prospective employees are required to submit to a pre-employment physical.[10] The record indicates that job applicants are individually examined by physicians who are experienced in giving such physical examinations and treating occupational injuries and diseases.

Dr. Balster testified his recommendation that Carmi could not perform the responsibilities of storekeeper was based upon his knowledge of the general duties of a storekeeper, including

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[8] We note that Carmi's inability to demonstrate a property right sufficient to invoke procedural due process or the infringement of some other federally protected right, is fatal to any substantive due process claim. *See Buhr* v. *Buffalo Public School Dist. No. 38,* 509 F.2d 1196, 1202-03 (8th Cir. 1974).

[9] Since the classification does not operate to disadvantage a suspect class or interfere with a fundamental right, the proper analysis is rationality rather than strict scrutiny. *See Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307, 312 (1976); *Antonio* v. *Kirkpatrick,* 579 F.2d 1147, 1148-49 (8th Cir. 1978).

[10] Carmi does not contend MSD has a pattern or general practice of excluding handicapped persons from employment.

the lifting and moving of very heavy objects, his observation of the degree of muscle deterioration in Carmi's hands and feet, and his knowledge of the significance of that degree of deterioration. We note that Dr. Balster has had 17 years of experience in the field of industrial medicine. While we express some reservation regarding the thoroughness of Dr. Balster's examination of Carmi, we cannot say his opinion was rendered arbitrarily. Under these circumstances, MSD's reliance upon his evaluation was not arbitrary and capricious, and its classification of those who pass the examination and those who do not is not "patently arbitrary." *Frontiero* v. *Richardson,* 411 U.S. 677, 683 (1973).

Because Carmi has not established a violation of any federal statutory or constitutional right, he has failed to establish a claim under 42 U.S.C. §§ 1983 and 1985(3).

The judgment of the district court is affirmed.

McMILLIAN, Circuit Judge, concurring.

I join in Judge Lay's opinion except part I. I do not think we need to address the difficult issue of whether §§ 504 and 505 of the Rehabilitation Act,[1] 29 U.S.C. §§ 794, 794(a)(2) cover

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[1] Section 504 of the Rehabilitation Act of 1973 provides:

> No otherwise qualified handicapped individual in the United States shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Pub. L. 93-112, 87 Stat. 355, 394 (1973), codified as 29 U.S.C. § 794. In 1978, a new § 505 was added to provide in part:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under [29 U.S.C. §] 794 . . .

Pub. L. 95-602, 92 Stat. 2955, 2983 (1978), codified as 29 U.S.C. § 794(a)(2).

employment practices of recipients of federal grants. The district court determined that appellant was not an "otherwise qualified handicapped individual" who suffered discrimination "solely by reason of his handicap," 29 U.S.C. § 794, and in my view that finding was not clearly erroneous. Therefore appellant cannot prevail even if the Act is applicable to discrimination in employment by recipients of federal grants. *See Southeastern Community College* v. *Davis,* 442 U.S. 397, 404-405 n.5 (1979).

In view of the majority's approach, however, I must express some reservations about the holding in part I of the majority opinion. Guaranteeing equal opportunity is one of express purposes of the Rehabilitation Act. 29 U.S.C. § 701 (1978).[2] The statute is a remedial measure, and I would follow the familiar maxim that remedial statutes are to be construed broadly to accomplish their purpose. In my view, it follows that general language of § 504 of the Rehabilitation Act prohibiting "discrimination under any program or activity receiving federal financial assistance" applies broadly to employment discrimination. 29 U.S.C. § 794. The Rehabilitation Act therefore imposes a general requirement upon recipients of federal grants not to discriminate against employees.[3] As the legislative history of the

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[2] An express purpose of the Rehabilitation Act of 1973 was to "expand employment opportunities in the public and private sectors for handicapped individuals," 29 U.S.C. § 701(8) (repealed 1978). The declaration of purpose was amended in 1978 to make it more concise. *See* H.R. Rep. No. 95-1149 at 41, [1978] U.S. CODE CONG. & AD. NEWS 7312, 7352. *See also* H.R. Conf. Rep. No. 95-1780 at 101, [1978] U.S. CODE CONG. & AD. NEWS 7375, 7412-13. Expansion of employment opportunities was one of eleven enumerated purposes in the 1973 Act; after the 1978 amendments the guarantee of equal opportunity generally was one of the specific aims of the Act.

[3] The Environmental Protection Agency (from which appellee received its grant) prohibits grantees from discriminating against employees generally on the basis of race, sex, national origin and religion. *See* 40 C.F.R. §30.410-(1) (1979) (requiring grantees to adhere to the requirements of Executive Order 11246, as amended, 40 C.F.R. part 8). Although the EPA does not seem to have issued

1974 Amendments to the Rehabilitation Act[4] explained, "Implementation of section 504 would . . . include pre-grant analysis of recipients to ensure that Federal Funds are not initially provided to those who discriminate against handicapped individuals." S. Rep. 93-1297, [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390-91.

As originally enacted in 1973, § 504 of the Rehabilitation Act simply prohibited handicap-based discrimination by recipients of federal grants. 29 U.S.C. § 794. The 1978 Amendments to the

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regulations concerning handicap-based discrimination by grantees, I see no reason for assuming that EPA would adopt a more narrow approach than for discrimination by grantees on the basis of race, national origin or religion. *See* 29 U.S.C. § 794a(a)(2). Under the mandate of § 2 of Executive Order 11914 (1976), 45 C.F.R. at 399, 400 (1979) (implementing the Rehabilitation Act), EPA is required to issue regulations prohibiting handicap-based discrimination, consistent with regulations issued by the Department of Health, Education and Welfare. The HEW regulations generally cover employment discrimination by recipients of federal grants. 45 C.F.R. §§ 85.52-85.55 (1979). *See* note 6 *infra.*

[4] The Rehabilitation Act, as originally enacted in 1973, contained only a single section on federal grants, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See* note 1 *supra.* The 1974 legislative history specifies that § 504 of the 1973 Act, 29 U.S.C. § 794, was modelled after § *601* of Title VI, not all of Title VI. S. Rep. No. 93-1297, [1974] U.S. CODE CONG. & AD. NEWS 6373, 6390. It therefore does not indicate that § *604* of Title VI was incorporated into the Rehabilitation Act. (§ 604, not § 601, of Title VI restricts coverage of employment discrimination.) Although the language of § 504 is similar to § 601 of Title VI, 42 U.S.C. § 2000d, the 1973 Act contained no provision similar to § 604 of Title VI, 42 U.S.C. § 2000d-3.

In 1974, Congress amended parts of the 1973 Rehabilitation Act, but not § 504. Therefore, I do not regard the 1974 legislative history as determinative of the meaning of § 504 of the 1973 Act or, of course, § 505 of the 1978 Act. *See Southeastern Community College* v. *Davis, supra,* 442 U.S. at 411-12 n.11; *Teamsters* v. *United States,* 431 U.S. 324, 354 n.39 (1977). However, both the majority and I give the 1974 legislative history some weight, although we disagree as to its significance. See slip op. at 5 and n.5.

Rehabilitation Act added § 505 which provides that "remedies, procedures, and rights" available under Title VI of the Civil Rights Act of 1964[5] are also available to a "person aggrieved" by handicap-based discrimination of federal grant recipients. 29 U.S.C. § 794a(a)(2). *See* note 1 *supra*. The majority holds that § 505 of the Rehabilitation Act thereby incorporates § 604 of Title VI, 42 U.S.C. § 2000d-3, which provides:

> Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the federal assistance is to provide employment.

However, § 604 of Title VI applies on its face only to agency action and says nothing at all about the remedies, procedures or rights available to persons aggrieved. Section 505 of the Rehabilitation Act refers to Title VI only insofar as it applies to "a person aggrieved." 29 U.S.C. § 794a(a)(2). Therefore the language of the Rehabilitation Act does not incorporate the language of § 604.[6]

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[5] 42 U.S.C. § 2000d *et seq.*

[6] The legislative history of § 505 supports this conclusion. Section 505 was part of the 1978 Amendments to the Rehabilitation Act, and was taken from Senate Bill S. 2600, 95th Cong. 2d Sess. The Committee Report on S. 2600 explained,

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 [29 U.S.C. § 794] conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

Nevertheless, the majority suggests that § 604 should be interpreted to preclude most individual as well as agency actions challenging employment discrimination. This interpretation of Title VI seems correct to me, in view of the overall statutory scheme of the Civil Rights Act of 1964,[7] of which Title VI was a part. But this interpretation cannot be supported under the Rehabilitation Act.

In the Civil Rights Act of 1964, Congress simultaneously provided Title VI covering recipients of federal grants and Title VII[8] covering employers whether or not such employers are recipients of federal grants. Although it is not inconceivable that Congress would have provided overlapping remedies in the same statute, the overall statutory program would seem to suggest that Congress intended Title VII to be the main vehicle for combatting employment discrimination based on race, religion, sex or national origin.[9] This overall program would be furthered

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S. Rep. No. 95-890 (1978) at 19. This report suggests that § 505 is consistent with HEW's regulations, which apply to employment practices generally of grant recipients. *See* 45 C.F.R. §§ 85.52-85.55 (1979). However, the Supreme Court, without mentioning this legislative history, has suggested that the HEW regulations may not be entitled to great deference because of the delays in assertion of regulatory authority under the 1973 Act. *Southeastern Community College* v. *Davis, supra,* 442 U.S. at 411, 412 n.11.

[7] Pub. L. 88-352, 78 Stat. 241 (1964).

[8] 42 U.S.C. § 2000e *et seq.*

[9] The EPA requires that grantees also follow the requirements of the federal contract compliance program prohibiting discrimination in employment on the basis of race, sex, religion, or national origin. *See* note 3 *supra.* It is unclear whether this regulation seeks to implement Title VI or rests on executive authority to prohibit discrimination. *Cf. Contractors Ass'n* v. *Secretary of Labor,* 442 F.2d 159, 166-71 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971) (affirmative action requirements for federal contractors under executive authority).

by the majority's interpretation to Title VI to cover employment discrimination only when the employee was an intended beneficiary of federal funds[10] or when the discrimination affected the intended beneficiaries of federal funds (as discrimination in employing teachers may affect students). *See United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 881-86 (5th Cir. 1966), *cert. denied,* 389 U.S. 840 (1967). *But see Cannon* v. *University of Chicago,* 441 U.S. 677, 711-714 nn.48-49 (1979) (suggesting that restrictions on agency action under § 605 of Title VI may not apply to actions by individuals).

Even if § 604 is interpreted to restrict individual actions under Title VI, it does not follow that a similar restriction exists on individual actions under the Rehabilitation Act, which encompasses a different kind of statutory scheme than the Civil Rights Act of 1964. Congress did not in the Rehabilitation Act provide any general prohibition on handicap-based discrimination which would sweep as broadly as Title VII of the Civil Rights Act of 1964. Only handicap-based employment discrimination by the federal government is covered by provisions comparable to Title VII. 29 U.S.C. §§ 791, 794a(a)(1). As to handicap-based discrimination by private employers or state and local governments, coverage extends only on the basis of a contractual ac-

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[10] In my view, it is no simple question whether a particular employee is an intended beneficiary of federal funds for purposes of applying Title VI to employment. A public works program, for example, may have a number of purposes, including the purpose of increasing the overall amount of resources available to the recipient. By funding one necessary project, the public works program may be intended to free up for other uses resources that would have been set aside for that project. The intended beneficiaries of federal funds may well include employees other than those working directly on the federally assisted project. I therefore cannot agree with the majority's rather summary finding that appellant was not an intended beneficiary of the grants received by appellee. In my view, resolution of this threshold question would involve consideration of such factors as the legislative intent in establishing the grant program, and the specific facts surrounding a particular grant.

tivity with or receipt of grants from the federal government. 29 U.S.C. §§ 793, 794, 794a(a)(2). Under this statutory scheme any coverage at all of handicap-based discrimination in employment depends upon the employer's status as a federal contractor or federal grantee. To hold that the statute would not cover most employment discrimination by federal grant recipients therefore means that the statute provides no remedy at all for many victims of handicap-based discrimination in employment. Therefore, even if § 604 were read into the Rehabilitation Act, the overall statutory scheme would not be furthered by extending § 604's literal restriction on agency action to restrict individual action.[11] In the Civil Rights Act of 1964, the restriction of individual actions under Title VI merely means that individuals must proceed under Title VII against employment discrimination based on race, national origin, or religion. Under the Rehabilitation Act, restriction of individual actions under § 794a(a)(2) would deny any remedy at all to many victims of discrimination.

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[11] As the majority points out, we have incorporated the restriction of § 604 of Title VI into Title IX of the Education Act Amendments of 1973, 20 U.S.C. § 1681 *et seq*. See slip op. at 5 n.6. We have accordingly restricted coverage of employment discrimination under Title IX. (Title VI prohibits discrimination based on race, national origin and religion, but not sex. Title IX was enacted in part to fill this gap in Title VI.)

Paralleling language of Title VI, Title IX prohibits discrimination based on sex in educational programs receiving federal funds, but Title IX does not contain specific language restricting coverage of employment discrimination as § 604 of Title VI does. Nevertheless, courts have read into Title IX a restriction on coverage of employment discrimination, because Title IX was proposed as part of a single measure that contained other provisions extending coverage under other laws of employment discrimination based on sex. The overall statutory scheme of Title IX thus suggests that Congress intended for employment discrimination to be covered under other Acts, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d), 213(a). *See*

Because the literal words of the statute do not require restricting the coverage of the Rehabilitation Act in this way, I would not do so in the absence of clear legislative intent. In any case, my reading of the legislative history of the Rehabilitation Act provisions in question suggests that Congress sought to expand, not limit, remedies available to victims of handicap-based discrimination. *See Hart* v. *Alameda County Probation Department,* 21 FEP Cases (BNA) 233, 238 (N.D. Cal. 1979). As noted above, an express purpose of the Rehabilitation Act was to provide equal employment opportunities for handicapped individuals, 29 U.S.C. § 701 (1978).

Accordingly, I would hold that the Rehabilitation Act imposes a requirement that entities receiving federal grants refrain from discriminating against their employees on the basis of handicap.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Islesboro School Commission v. *Califano,* 593 F.2d 424, 426-29 (1st Cir.), *cert. denied,* 100 S.Ct. 467 (1979). We adopted the reasoning of that case in *Junior College Dist.* v. *Califano,* 597 F.2d 119, 121 (8th Cir.), *cert. denied,* 100 S. Ct. 467 (1979).

By contrast, an express purpose of the Rehabilitation Act of 1973 was to "expand employment opportunities in the public and private sectors for handicapped individuals." 29 U.S.C. § 701(8). *See* note 2 *supra.* As enacted in 1973, the Rehabilitation Act, like Title IX, included language similar to Title VI, but did not include the restriction on coverage of employment discrimination. Unlike Title IX, however, the statutory program of the Rehabilitation Act did not include other provisions for combatting employment discrimination against the handicapped by recipients of federal grants. The reasoning of the *Islesboro School Commission* case therefore does not apply. On the contrary, the absence of a restriction on agency action suggests that Congress intended § 794 to cover employment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

79-1325

Paul D. Carmi,
Appellant,

vs

Metropolitan St. Louis Sewer District, etc., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

May 29, 1980

Supreme Court, U. S.
FILED
AUG 11 1980
MICHAEL RODAK, JR., CLERK

No. 80-59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

PAUL D. CARMI,
Petitioner,

vs.

METROPOLITAN ST. LOUIS SEWER DISTRICT, a municipal corporation; LAWRENCE J. BANNES, RICHARD A. MEYER, MARVIN O. YOUNG, R. EMMETT CONCANNON, HENRY W. LEE, JR., PHELIM O'TOOLE, JR., individually and in official capacity as members of Board of Trustees of The Metropolitan St. Louis Sewer District; PETER F. MATTEI, Exec. Director; MARY HAISLIP, Personnel Officer, individually and in official capacities,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a person has standing to bring a private action for employment discrimination against a recipient of federal aid under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, only where a primary objective of the federal financial assistance is to provide employment.

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No. 80-59

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

PAUL D. CARMI,
Petitioner,

vs.

METROPOLITAN ST. LOUIS SEWER DISTRICT, a municipal corporation; LAWRENCE J. BANNES, RICHARD A. MEYER, MARVIN O. YOUNG, R. EMMETT CONCANNON, HENRY W. LEE, JR., PHELIM O'TOOLE, JR., individually and in official capacity as members of Board of Trustees of The Metropolitan St. Louis Sewer District; PETER F. MATTEI, Exec. Director; MARY HAISLIP, Personnel Officer, individually and in official capacities,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents[1] respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

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[1]The opinions of the courts below and the Petition incorrectly state the names of the individual Respondents in this case. The correct names and spellings are set forth in the caption herein.

OPINIONS BELOW

The opinion and judgment of the district court (App. A, *infra,* pp. A-1—A-9) is reported at 471 F.Supp. 119 (E.D. Mo. 1979). The opinion of the court of appeals (App. A to Petition, pp. A-1 through A-15) is reported at 620 F.2d 672 (8th Cir. 1980).

STATEMENT

Paul Carmi has a rare hereditory physical disability known as Progressive Peroneal Atrophy (or Charcot-Marie-Tooth Disease). This is a condition in which there is a slow but marked progressive deterioration of the muscles and nerves in the hands and feet. As a result, Carmi has a significant weakness of grip in both hands and is unable to lift repeatedly objects weighing in excess of forty pounds. App. A, *infra,* p. A-3.

In April, 1976, Carmi applied for a position as a "storekeeper" at the Bissell Plant operated by the Metropolitan St. Louis Sewer District ("MSD"). The duties of a storekeeper include:

> . . . receiving and issuing supplies and tools; repairing tools; operating a forklift in the course of receiving supplies; checking and issuing all material handling equipment; inventorying; maintaining and organizing equipment, supplies, and material storage; and sweeping and cleaning the shop.
>
> In the course of receiving and storing supplies, the storekeeper must be capable of rolling and moving fifty five gallon drums weighing approximately four hundred and fifty pounds by utilizing a drum dolly; operating a forklift truck; lifting heavy and bulky objects either by himself or with the assistance of an attendant or mechanic. Photographs of the storeroom show that the storekeeper would be required to lift heavy materials above his head and climb ladders. The heavier items in the storeroom weigh from forty eight to one hundred and seventy pounds. App. A, *infra,* p. A-3.

As part of the hiring process, Carmi was required to submit to a pre-employment physical examination. The doctor who performed the examination recommended that Carmi not be hired for the storekeeper position because he was not capable of lifting sixty pounds on a regular basis or safely driving a forklift. App. A, *infra,* p. A-4. On the basis of the doctor's recommendation, MSD declined to hire Carmi as a storekeeper. App. A, *infra* p. A-4. During 1976, MSD received federal financial assistance from the Environmental Protection Agency in the form of construction and engineering grants. App. A, *infra,* p. A-7.

The district court found as a fact that Carmi could not perform the necessary duties and responsibilities required of a storekeeper on a regular basis. App. A, *infra,* p. A-5. Assuming without deciding that Carmi had standing to sue, the district court concluded, as a matter of law, that Carmi was not an "otherwise qualified handicapped individual" within the meaning of Section 504 and entered judgment in favor of MSD. App. A, *infra,* pp. A-5.[2]

The court of appeals affirmed. The majority opinion held that Carmi lacked standing to sue for employment discrimination under Section 504 because he was not an intended beneficiary of the federal aid received by MSD during 1976. App. A to Petition, p. A-6. Concurring in the result, Judge McMillian disagreed with the majority's holding that the limitations on private judicial enforcement under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.*, apply to private suits under Section 504. However, Judge McMillian noted his view that the district court was not clearly erroneous in finding that Carmi failed to show he was an "otherwise qualified handicapped individual." Hence, Carmi could not have prevailed on the merits even if Section 504 was applicable. App. to Petition, p. A-9.

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[2]Carmi's other claims are not before this Court.

REASONS FOR DENYING THE WRIT

Petitioner overstates the effect of the decision of the court of appeals in claiming that it deprives handicapped individuals of any remedy for employment discrimination. The holding of the court below allows handicapped individuals to pursue such actions against recipients of federal aid where a primary purpose of the federal financial assistance is to provide employment. Thus, the Question Presented by this case is the narrower one set forth herein, *i.e.*, whether the Plaintiff must be an intended beneficiary of the federal aid in order to maintain a private suit under Section 504.

1. **The court of appeals are not in conflict upon the Question Presented.** Section 120(a) of the Comprehensive Rehabilitation Services Amendments of 1978, 29 U.S.C. §794a(a)(2) expressly makes the remedies, procedures and rights of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, *et seq.*, applicable to actions under Section 504. In suits charging employment discrimination under Title VI, one of the purposes of the federal financial assistance must be to provide employment. *See, United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 882-83 (5th Cir. 1966), *cert. denied,* 389 U.S. 840 (1967). The court of appeals concluded that, since Section 504 was modeled after and intended to be enforced in the same manner as Title VI, the same limitations upon private enforcement should apply. App. A to Petition, pp. A-4 through A-5. The only other court of appeals to decide the issue after the enactment of the 1978 Amendments reached the same conclusion. *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied,* 442 U.S. 947 (1979). The cases relied upon by Petitioner, such as *Gurmankin* v. *Costanzo,* 556 F.2d 184 (3d Cir. 1977), did not deal with the 1978 Amendments.

Further, Section 504 was modeled after Section 901 of Title IX, Educational Amendments Act of 1972, 20 U.S.C. §1681. The interpretation placed upon Section 504 by the court of ap-

peals is consistent with recent decisions construing Section 901(a), which contains almost identical language. *See, Junior College District* v. *Califano,* 597 F.2d 119 (8th Cir.) *cert. denied,* 100 S.Ct. 467 (1979); *Islesboro School Comm.* v. *Califano,* 593 F.2d 424 (1st Cir.) *cert. denied,* 100 S.Ct. 467 (1979); *Romeo Community Schools* v. *H.E.W.,* 600 F.2d 581 (6th Cir.), *cert. denied,* 100 S.Ct. 467 (1979).

2. **Adoption of the position urged by Petitioner would not alter the ultimate outcome of this litigation.** If this Court should grant the Petition and reverse the decision of the court of appeals on the Question Presented, then the ultimate result in this case would depend upon a factual finding as to whether Carmi was an "otherwise qualified handicapped individual." *Southeastern Community College* v. *Davis,* 442 U.S. 397 (1979). The district court found as a fact that Carmi could not perform the necessary duties and responsibilities of a storekeeper. App. A, *infra,* p. A-6. Hence, it concluded he was not an otherwise qualified handicapped individual. App. A, *infra,* p. A-6. Although the majority opinion does not directly address the issue of the propriety of such findings, the concurring opinion expressed the view that they were not clearly erroneous. *Cf.,* F.R.Civ.P. 52(a). The Petition does not challenge the factual findings of the district court or the concurrence in the factual findings by the court of appeals.

Under these circumstances, Carmi could not prevail even if the position urged by his Petition were adopted. This Court has frequently said that it is not "a court for correction of errors in fact finding, [and it will not] undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.,* 336 U.S. 271, 275 (1949). This Court's function is judicial and not simply to resolve abstract questions of law which cannot affect the ultimate result of the litigation. *Cf. United States* v. *Summerville,* 324 F.2d 712 (3d Cir.), *cert denied,* 376 U.S. 909 (1964) (result of the litigation unaffected

by decision upon question presented by the Petition for Writ of Certiorari). Resolution of the Question Presented, if needed, should await a time when it can be had in the context of meaningful litigation affecting the rights of the parties involved in a concrete and less abstract way. *Cf. The Monrosa* v. *Carbon Black Exports, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

For the foregoing reasons, Respondents request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August, 1980

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Paul D. Carmi,

Plaintiff,

v.

No. 76-934 C (2)

The Metropolitan St. Louis Sewer District, Lawrence J. Bannes, Richard A. Meyer, Marvin O. Young, R. Emmett Concannon, Henry W. Lee, Jr., Phelim F. O'Toole, Jr., individually and in their official capacities as members of the Board of Trustees of the Metropolitan St. Louis Sewer District, Peter F. Mattei, and Mary Hayslett individually and in their official capacities as agents for the Metropolitan St. Louis Sewer District,

Defendants.

MEMORANDUM
(Filed March 21, 1979)

The above entitled case challenges defendants' failure to hire plaintiff, a handicapped individual. Plaintiff alleges that he was discriminated against by defendants, in violation of 29 U.S.C. §794 (§504 of the Rehabilitation Act of 1973), 42 U.S.C. §1983, 42 U.S.C. §1985(3), the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment.

This cause having been tried to the Court sitting without a jury, the Court, after fully considering the evidence and the applicable law, hereby makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff (Carmi) is a citizen of the United States and a resident of the State of Missouri.

2. Defendant Metropolitan St. Louis Sewer District (MSD) is a municipal corporation and political subdivision of the State of Missouri established by virtue of §30 of Article 6 of the Constitution of Missouri, and by a vote of the voters of the City of St. Louis and St. Louis County held in 1954.

3. Defendants S. Joseph Cento, Milton J. Bischoff, Marvin O. Young, Frederick H. Rodefeld, Henry W. Lee, Jr., and Frank C. Borghi comprise the Board of Trustees of MSD.

4. Defendant Peter F. Mattei is the Executive Director of MSD and as such is responsible for the administration of MSD.

5. Defendant Mary Hayslett is the Personnel Supervisor of MSD and as such is responsible for the implementation of personnel policies at MSD.

6. During the calendar year, 1976, MSD received federal financial assistance from the Environmental Protection Agency in the form of construction grants for the Lemay Treatment Plant, the secondary treatment plant on the Mississippi River and engineering grants in connection therewith.

7. Carmi has a rare, hereditary physical disability known as Progressive Peroneal Atrophy (or Charcot-Marie-Tooth Disease). This is a condition in which there is a muscle and nerve deterioration an[d] atrophy in the muscles of the hands and dorsiflexors of the feet. It has a slow but marked progressive course. As a result of the atrophy in his hands, Carmi has a

significant and marked weakness of grip in both hands. He has a slightly uneven gait, he has difficulty in rising from a squatting position, and he is unable to repeatedly lift objects in excess of forty pounds.

8. On April 1, 1976, Carmi applied for employment with MSD indicating a preference for the position of storekeeper.

9. After following the procedures and requirements set forth in the Metropolitan St. Louis Sewer District civil service rules and regulations, MSD found Carmi qualified to fill the position of storekeeper and he thus became the preferred applicant for the job of storekeeper 1 at the Bissell Treatment Plant of MSD, his employment being contingent upon successful completion of a physical examination.

10. Among the work assignments performed by a storekeeper at the Bissell plant are receiving and issuing supplies and tools; repairing tools; operating a forklift in the course of receiving supplies; checking and issuing all material handling equipment; inventorying; maintaining and organizing equipment, supplies, and material storage; and sweeping and cleaning the shop.

In the course of receiving and storing supplies, the storekeeper must be capable of rolling and moving fifty five gallon drums weighing approximately four hundred and fifty pounds by utilizing a drum dolly; operating a forklift truck; lifting heavy and bulky objects either by himself or with the assistance of an attendant or mechanic. Photographs of the storeroom show that the storekeeper would be required to lift heavy materials above his head and climb ladders. The heavier items in the storeroom weigh from forty eight to one hundred and seventy pounds.

11. MSD consistently requires successful completion of a pre-employment physical examination of all prospective employees as a last step in its hiring process. All such examinations are performed at Sutter Clinics, Inc., a totally independent establish-

ment utilized by MSD on a fee-for-service basis. The practice of MSD is not to employ any applicant found unfit for employment by Sutter. The record is devoid of any evidence tending to show that MSD's reliance upon the medical opinions expressed by the doctors at Sutter Clinics, Inc. with respect to physical qualifications of applicants was unjustified or exercised in bad faith.

12. On May 6, 1976 Carmi was examined at Sutter Clinics, Inc. by Dr. Vernon Balster. It was the opinion of Dr. Balster that Carmi not be hired for the storekeeper position because he was not capable of lifting sixty pounds on a regular basis or safely driving a forklift.

13. While this Court reserves some doubt whether the aforesaid physical examination was an exhaustively adequate measure of plaintiff's ability to perform job related functions, this Court concludes that Carmi failed to demonstrate that he could perform the necessary duties and responsibilities required of a storekeeper at the Bissell plant on a daily and continued basis. There was testimony that plaintiff could lift nineteen pounds; there was conflicting testimony as to whether he could lift between twenty and forty pounds, and this Court finds from all the evidence that plaintiff has not shown that he could lift over forty pounds.

14. MSD, after being informed of the results of the physical examination and the recommendations of Dr. Balster, made the decision not to hire Carmi for the position of storekeeper at the Bissell plant.

15. Carmi's application for employment was kept on file by MSD after May 6, 1976, and he was considered for at least one other position. At one point in the Summer of 1976 he was interviewed for a position of rod chain man. No physical examination was necesary because a more experienced man was hired.

16. Carmi has held various jobs since May 6, 1976 with employers other than MSD. As of June 28, 1978 he was employed as Gusdorf Corp. as a parts clerk.

Conclusions Of Law

This Court has jurisdiction over the parties and jurisdiction over the subject matter pursuant to 28 U.S.C. §§1331 and 1343(3) and (4). At all times pertinent to this lawsuit MSD received federal financial assistance within the meaning of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

Carmi was a handicapped individual within the meaning of 29 U.S.C. §706(6). Without deciding the issue this Court assumes the Rehabilitation Act allows a private right of action. In *United Handicapped Fed.* v. *Andre,* 558 F.2d 413 (8th Cir. 1977), the Eighth Circuit relying upon *Lloyd* v. *Illinois Reg. Transp. Auth.* 548 F.2d 1277 (7th Cir. 1977) held that private citizens may seek injunctive relief under the Rehabilitation Act. A determination of whether damages may be recovered by a private citizen under the Rehabilitation Act is not necessary to the resolution of this lawsuit.

As an essential element of plaintiff's statutory claim under the Rehabilitation Act he must show that he was "an otherwise qualified handicapped individual".*

The Court concludes, as a matter of law, that Carmi failed to demonstrate that he had the ability to perform necessary and job related skills. Therefore, his complaint insofar as it relates to the Rehabilitation Act must be dismissed.

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* 29 U.S.C. §794 provides: No otherwise qualified handicapped individual in the United States, as defined in §706(6) of this Title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

"Otherwise qualified" does not mean that a handicapped individual must be hired despite his handicap. The statute prohibits the non-hiring of an handicapped individual when the disability does not prevent that individual from performing the job.

This Court need not make a finding of whether a restructuring of the position of storekeeper of the Bissell plant to the physical limitations of the plaintiff would have imposed an undue hardship on MSD because of the following reasons: (a) any duty on recipients of federal financial assistance to accommodate handicapped persons by tailoring the job to the abilities of the applicant arguably stems from regulations established by the Secretary of Health, Education and Welfare in 1977 and 1978, years subsequent to the date in which MSD failed to hire plaintiff in this case. See 42 Fed. Reg. at 22676, 22680 (1977) and 43 Fed. Reg. at 2134, 2138 (1978). The Rehabilitation Act of 1973, by itself, imposes no such affirmative duty, it merely prohibits discrimination against otherwise qualified handicapped individuals; (b) a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest in justice where there is statutory direction or legislative history to do the contrary. *Bradley* v. *School Bd. of City of Richmond,* 416 U.S. 696, 711 (1974). Regulations which require affirmative remedial efforts to give special attention to handicaps cannot be given retroactive effect absent a clear statutory basis that would have put recipients of federal assistance on notice that they would be so required. Manifest injustice could result from regulations such as those in question here, which reflect a vast change in law from the statute they are intended to implement; (c) the legislative and administrative history surrounding the promulgation of the statute and regulations support the conclusion that the regulations are inapplicable here. The discrimination provisions of the Rehabilitation Act were not intended to be self executing. *See Cherry* v. *Matthews,* 419 F. Supp. 922, 924 (D.D.C. 1976) and legislative history cited therein.

Moreover, none of the regulations implementing the statute apply to MSD. The regulations adopted by HEW on May 4, 1977 apply only to recipients of financial assistance from HEW. The regulations adopted by HEW on January 13, 1978 were intended to serve as models for regulations to be issued by each agency or department of the federal government that provides financial assistance and were not to have retroactive reach. 43 F. Reg. 21, 33 (1978). The record discloses no evidence that MSD ever received any federal assistance from any other federal agency other than the environmental protection agency. At this time the EPA has not promulgated any rules regulating the recipients of its assistance.

Plaintiff alleges that the denial of employment to applicants with Progressive Peroneal Atrophy while hiring otherwise qualified applicants is an unjustified and unreasonable classification in violation of the Equal Protection Clause. This Court disagrees. When applicants have Progressive Peroneal Atrophy to the degree that they are not capable of performing all the responsibilities and duties requisite to the job the classification is reasonable and allowable.

MSD maintained plaintiff's job application on file and considered hiring him, and indeed interviewed him, for another job. It is undisputed that Carmi's handicap in no way hindered his selection as the preferred applicant. Therefore, plaintiff's reliance on *Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632 (1974) is misplaced. There has been no showing that MSD adopted an irrebuttable presumption against hiring either handicaps in general or individuals with Progressive Peroneal Atrophy in particular. Indeed the record is replete with evidence of the positive regard MSD possesses for handicapped individuals employed by MSD.

Plaintiff's complaint, insofar as it rests on the due process clause, must be dismissed. Plaintiff, lacking the qualifications for the job of storekeeper, has no liberty or property interests which he may assert. *Bishop* v. *Wood,* 426 U.S. 341 (1976).

In a holding as a conclusion of law that defendants did not deprive or conspire to deprive plaintiff of any constitutional rights or deprive plaintiff of any rights, privileges or immunities secured by the Rehabilitation Act, it follows that plaintiff's claims under 42 U.S.C. §§1983 and 1985(3) must also fail.

Judgement must be entered for the defendants.

Dated this 21st day of March, 1979.

/s/ H. Kenneth Wangelin
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Paul D. Carmi,

Plaintiff,

v.

No. 76-934 C (2)

The Metropolitan St. Louis Sewer District, Lawrence J. Bannes, Richard A. Meyer, Marvin O. Young, R. Emmett Concannon, Henry W. Lee, Jr., Phelim F. O'Toole, Jr., individually and in their official capacities as members of the Board of Trustees of the Metropolitan St. Louis Sewer District, Peter F. Mattei, and Mary Hayslett individually and in their official capacities as agents for the Metropolitan St. Louis Sewer District,

Defendants.

JUDGMENT
(Filed March 21, 1979)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants have judgment against plaintiff Paul D. Carmi on plaintiff's complaint.

Dated this 21st day of March, 1979.

/s/ H. Kenneth Wangelin
United States District Judge